TABLE OF CONTENTS

PAGE

I. The Majority's Disregard of the Pertinent Legislative History Is Irreconcilable With Opinions Handed Down the *Same Day* as *Otter Tail* 2

II. The Majority Opinion Erroneously Ignores the Controlling Principles Established in the *Ricci* Case 7

III. The Majority's *Per Se Condemnation* of Otter Tail's Contracts Is Manifestly Inconsistent With the Rule of Reason Approach Adopted in *Ricci* and in Other Portions of the *Otter Tail* Opinion Itself 12

IV. The Majority Opinion Is Predicated Upon Misapprehensions of Fact Which Are Specifically Negatived by the Record 14

Conclusion 23

Certificate of Counsel 24

Cases Cited

PAGE

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 11, 22
In re Colinas, Inc., 426 F. 2d 1005 (1st Cir. 1970) 14
Lehnhausen v. Lake Shore Auto Parts Co., 41 U.S.L.W. 4289 (U.S. February 23, 1973) 6, 7
Otter Tail Power Company v. United States, — U.S. — (February 22, 1973) 4, 5, 6, 7, 8, 9, 11, 12, 14
Ricci v. Chicago Mercantile Exchange, 41 U.S.L.W. 4097 (U.S. January 9, 1973) 7, 8, 9, 11, 12
Silver v. New York Stock Exchange, 373 U.S. 341 (1963) 11, 12, 13
Union Leader Corporation v. Newspapers of New England, Inc., 284 F. 2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961) 14
United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) 14
United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964) 14
United States v. Enmons, 41 U.S.L.W. 4301 (U.S. February 22, 1973) 2, 3, 4, 5, 6, 7
United States v. Twentieth Century-Fox Film Corp., 137 F. Supp. 78 (Cal. D.C. 1955) 14
Village of Elbow Lake v. Otter Tail Power Co., 46 F.P.C. 675 (1971), rev'd, in part, — F. 2d — (8th Cir. February 21, 1973) 9, 10

Statutes Cited

	PAGE
Federal Power Act, 16 U.S.C. §824 *et seq.*	2, 3, 7, 8, 10, 11, 12, 13
Section 202(a), 16 U.S.C. §824a(a)	12
Section 202(b), 16 U.S.C. §824a(b)	8, 9

Other Authorities Cited

	PAGE
Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce, 74th Cong., 1st Sess. (1935)	4
Hearings on S. 3136 Before the Senate Comm. on Commerce, 89th Cong., 2nd Sess. 58 (1966)	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-991

OTTER TAIL POWER COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

PETITION FOR REHEARING SUBMITTED BY OTTER TAIL POWER COMPANY

Upon the grounds set forth herein, Otter Tail respectfully petitions this Court for a rehearing of the decision filed February 22, 1973. The Certificate of Counsel required by Rule 58 is contained at the end of this Petition.

I. The Majority's Disregard of the Pertinent Legislative History Is Irreconcilable With Opinions Handed Down *the Same Day as Otter Tail.*

The majority's failure to come to grips with the evidence of Congress's intent contained in the legislative history of the Federal Power Act is totally at odds with the Court's contemporaneous decision in *United States v. Enmons*, 41 U.S.L.W. 4301 (U.S. February 22, 1973).

The issue in *Enmons* was whether the Hobbs Act applied to acts of violence committed in the course of a labor dispute as part of a union effort to obtain higher wages. The Court held that the Act did not apply, basing its decision almost entirely upon the legislative history of the statute in question. Particular reliance was placed upon the testimony of Congressman Hobbs, quoted as follows in the *Enmons* opinion:

> "'Mr. Marcantonio. All right. In connection with a strike, if an incident occurs which involves—
>
> 'Mr. Hobbs. The gentleman need go no further. This bill does not cover strikes or any question relating to strikes.
>
> 'Mr. Marcantonio. Will the gentleman put a provision in the bill stating so?
>
> 'Mr. Hobbs. We do not have to, because a strike is perfectly lawful and has been so described by the Supreme Court and by the statutes we have passed. This bill takes off from the springboard that the act must be unlawful to come within the purview of this bill.
>
> 'Mr. Marcantonio. That does not answer my point. My point is that an incident such as a simple assault which takes place in a strike could happen. Am I correct?
>
> 'Mr. Hobbs. Certainly.

'Mr. Marcantonio. That then could become an extortion under the gentleman's bill, and that striker as well as his union officials could be charged with violation of sections in this bill.

'Mr. Hobbs. I disagree with that and deny it in toto.' 89 Cong. Rec. 3213" *Id.* at 4304.

The Court read this testimony as "explicitly [refuting] the suggestion that strike violence to achieve a union's legitimate objectives was encompassed by the Act." *Id.*

In view of the crucial importance attached to the testimony of the sponsor of the Hobbs Act, it is, at the least, inconsistent, for the *Otter Tail* Court to have totally ignored the similar—but far more compelling—testimony of the draftsmen of the Federal Power Act. The following excerpts from the legislative history of the governing statute demonstrate beyond question Congress's specific intent not to require any private utility to wheel government power so as to promote "competition" and thereby its own ouster from municipal markets:

"Mr. Pettengill. . . . I would like to ask you this question: Here is a market, let us say (indicating) in my home city; here is a generating plant, and we will say that that entire market is being supplied by this generating plant, and it is capable of furnishing sufficient power. Here is another generating plant owned by a competitor of this one (indicating and illustrating), and does not have access to this market. It has no transmission lines. Now, do you agree that by order of your Commission you may require this company (indicating) to carry that generating plant's (indicating) energy to that market in competition with the original company?

Mr. DeVane. No, sir; if I understand your question, the answer to that is 'no.' . . . There is nothing in this bill that permits one utility to enter another utility's field and in doing so to require the other utility to transport its power for the purpose. . . .

"Mr. Pettengill. Let us say that is true. Suppose this company (indicating) wanted to drive that company (indicating) out of business and was willing to deliver the power to this market (indicating) much below cost?

Mr. DeVane. That is one of the things that this bill would *prevent*. We are seeking regulation. We are not seeking lower rates through competition. . . . *The bill is not drawn upon the theory that competition shall be established in the industry. Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce*, 74th Cong., 1st Sess. (1935) at 554-558 (emphasis added).

In the face of the foregoing excerpts, it is plainly inconsistent with *Enmons* for the majority simply to declare "[*t*]*here is nothing in the legislative history which reveals a purpose to insulate electric power companies from the operation of the antitrust laws.*" Slip Opinion, p. 6 (emphasis added).

It is equally clear that the majority's view that Congress intended to leave wheeling in the area of voluntary action *and therefore subject to the antitrust laws* (*id.* at 7), stands the legislative history on its head. The plain fact is that in question after question, the Congressmen who interrogated Solicitor DeVane manifested an undeniable intent to formulate the bill so that a utility wishing to protect its retail market from competitive incursions could do so by refusing to wheel. It is perfectly evident that if Congress had been able to fore-

see the Court's decision in the present case, it would have enacted specific legislation to preclude any such result. It did not do so for the simple reason that it was repeatedly reassured by the bill's draftsmen that wheeling could not be compelled under *any* provision of existing law. When the proposal was made to empower the FPC to order wheeling, the suggestion met with virtually universal opposition—not because Congress intended wheeling to be governed by antitrust, but because it was persuaded that any form of compulsory wheeling would be an economic disaster for the private utility industry. Thus, in imposing forced wheeling in the instant case, the Court's decision is plainly and diametrically opposite to Congress's clearly stated purpose.

The dissenters in *Enmons*, while disagreeing about which portions of the legislative history were relevant, fully subscribed to the majority view as to the dispositive importance of Congress's intent as manifested in the legislative history. Ironically, the dissent criticizes the majority in *Enmons* for achieving "by interpretation what those who were opposed to the Hobbs Act were unable to get Congress to do." 41 U.S.L.W. at 4306. Yet this is precisely what the Court has done in the instant case, where proponents of forced wheeling have won by judicial decision the very result that they repeatedly—but unsuccessfully—sought from Congress.[1] Indeed, nothing could be more directly contrary to the holding in this case than the ringing conclusion to the dissent in *Enmons:*

> "It is easy in these insulated chambers to put an attractive gloss on an Act of Congress if five [here, four] votes can be obtained. At times the legislative history of a measure is so clouded or obscure that we must perforce

[1] *See, e.g.*, the wheeling bills proposed but not enacted which are cited in the dissenting opinion in *Otter Tail*. Slip Opinion, p. 5, n. 4.

give some meaning to vague words. But where, as here, the consensus of the House is so clear, we should carry out its purpose no matter how distasteful or undesirable that policy may be to us, unless of course the Act oversteps constitutional boundaries. But none has been so hardy as even to suggest that.

While we said in Kirschbaum Co. v. Walling, 316 U.S. 517, 522, that it is 'retrospective expansion of meaning which properly deserves the stigma of judicial legislation,' the same is true of retrospective contraction of meaning." *Id.* at 4308.

In the instant case, the meaning of the legislative history has not merely been expanded or contracted—it has been literally reversed. The impropriety of such disregard for Congress's intent is especially poignant where, as here, Congress promised the industry that forced wheeling would not be imposed, and the industry has relied in good faith on this legislative act for some 38 years.[2] Furthermore, the Court's reversal of Congress is particularly inappropriate in the instant case in view of the wealth of evidence as to the economic impact of forced wheeling upon which Congress based its determination. As this Court stated in *Lehnhausen v. Lake Shore Auto Parts Co.*, 41 U.S.L.W. 4289 (U.S. February 22, 1973)—another decision handed down the same day as *Otter Tail:*

"We could strike down this tax as discriminatory only if we substituted our judgment on facts of which we can be only dimly aware for a legislative judgment that reflects a vivid reaction to pressing fiscal problems. Quaker

[2] In addition, it is of course manifestly unfair to apply such judical legislation retroactively to punish utilities that acted in *bona fide* reliance upon Congress' determination.

City Cab Co. v. Pennsylvania is only a relic of a bygone era. We cannot follow it and stay within the narrow confines of judicial review, which is an important part of our constitutional tradition." *Id.* at 4292.

Plainly, if this Court's pronouncements as to the importance of legislative history and the role of the judiciary are to have any meaning, the present inconsistency among opinions handed down on the same day cannot be permitted to stand. Rehearing should therefore be granted to reconsider the *Otter Tail* decision in light of *Enmons* and *Lehnhausen* and a fair reading of the legislative history of the Federal Power Act.

II. The Majority Opinion Erroneously Ignores the Controlling Principles Established in the *Ricci* Case.

The majority opinion is inconsistent with this Court's decision in *Ricci v. Chicago Mercantile Exchange*, 41 U.S.L.W. 4097 (U.S. January 9, 1973), handed down subsequent to the argument in the instant case. Although the statute involved in *Ricci*—the Commodity Exchange Act—provided an administrative scheme which did not require that competitive considerations be taken into account, and which arguably did not even give the agency in question jurisdiction over the subject matter of the antitrust dispute, the Court held that the controversy should be referred in the first instance to the Commodity Exchange Commission and might thereafter be immunized from antitrust, depending upon the Commission's determination as to the facts.

Under *Ricci*, the application of the primary jurisdiction doctrine is dependent upon the following "related premises":

"(1) that it will be essential for the Antitrust Court to determine whether the Commodity Exchange Act or any of its provisions are 'incompatible with the maintenance of the antitrust action,' *Silver v. New York Stock Exchange*, 373 U.S., at 358; (2) that some facets of the dispute between Ricci and the Exchange are within the statutory jurisdiction of the Commodity Exchange Commission; and (3) that adjudication of that dispute by the Commission promises to be of material aid in resolving the immunity question." *Id.* at 4101.

All three *Ricci* criteria are plainly met in the instant case:

1. The majority itself recognizes that at least some of the requirements of the Federal Power Act are incompatible with antitrust. It thus acknowledges that compulsory interconnections or wheeling cannot be ordered under the district court's antitrust decree if the result would be to "impair [Otter Tail's] ability to render adequate service to its customers," and relies upon the requirement of Federal Power Commission approval and the retained jurisdiction of the district court to ensure that the policies of the Federal Power Act will be given effect. Slip Opinion, p. 14.

2. The *Ricci* criterion that "some facets of the dispute . . . are within the statutory jurisdiction of the [agency]" is likewise clearly satisfied in this case, since the FPC has indisputable authority to compel the interconnections and wholesaling under Section 202(b).

3. Recognition of the third and final *Ricci* criterion—"that adjudication of that dispute by the Commission promises to be of material aid in resolving the immunity question"—is implicit in the majority's decision to reserve the issue of "whether the antitrust remedy may override the power of the

Commission under Section 202(b)" until such time as the Commission enters an order denying an interconnection. Slip Opinion, p. 9.

In view of the above, it is clear that the rule in *Ricci* applies squarely to the instant case. Accordingly, the district court should have (i) stayed its hand until the Federal Power Commission had entered an order with respect to Elbow Lake's application for a long term interconnection, and (ii) then made an "intelligent and sensitive judgment" as to the immunity question based upon the Commission's findings. Had it done this, the Court's judgment would have reflected the Commission's expert determination that "Otter Tail is legitimately concerned about the possible erosion of its system."[3] and thus would not have simply rejected out of hand Otter Tail's so-called "pessimistic view." Furthermore, the Commission's decision ordering a long term interconnection would have underscored the lack of any need to impose antitrust sanctions to achieve the same result. On the other hand, the FPC's expressed view that it would not be in the public interest to encourage further municipal power ventures such as Elbow Lake's would have provided a compelling reason for not ordering Otter Tail to wholesale and wheel for *all* municipalities *upon demand.*

An "intelligent and sensitive" appraisal of the Commission's proceedings would have made clear to the district court that municipal power disputes involve not only Otter Tail and the municipality in question, but Otter Tail's *ratepayers* as well. This point was recognized by the Eighth Circuit in its February 21, 1973 modification of the Elbow Lake long term interconnection order, when the Court of Appeals quoted with

[3] *Village of Elbow Lake v. Otter Tail Power Co.*, 46 F.P.C. 675, 677-678 (1971).

approval the following holding of the FPC presiding examiner:

> "In substance, Staff's recommended capacity credit would require Otter Tail *and its customers* to pay for Elbow Lake's ill-advised excursion into the power business. . . . [T]he credit serves as a means for enabling Elbow Lake to recoup at the expense of the Otter Tail's *rate payer* the money committed for the purchase of the generating equipment." Otter Tail Power Company v. FPC, Slip Opinion, p. 9, n. 5 (emphasis added).

Taking this consideration into account, the district court ought to have concluded that Otter Tail's action in refusing to interconnect voluntarily—and thus giving the FPC an opportunity to pass on the question—should be immunized from antitrust attack. The Commission, after all, is the only body qualified to arbitrate between the interests of Otter Tail's ratepayers and those of consumers in a given municipality, and a rule which would penalize resort to the Commission would in effect require that the interests of Otter Tail's ratepayers be sacrificed in every case—a result that would be clearly contrary to the policies of the Federal Power Act.

Finally, consideration of the Commission's decision would have made clear the plain repugnancy between antitrust and Federal Power Act policies, and the consequent necessity for an accommodation between the two schemes. Indeed, this need was recognized by the majority itself when it indicated that the district court should stay its hand in enforcing the decree if the Commission finds that an interconnection would not be in the public interest. The Court's opinion further suggests that if the Commission refuses to order the interconnection, the utility's refusal presumably would not be subject to anti-

trust attack—unless the Court intends to encourage a morass of inconsistent rulings under the hybrid form of regulation that the *Otter Tail* decision forecasts. Had the district court likewise taken the policies of the Federal Power Act into account, the repugnancy between the statutory schemes could have been reconciled as *Ricci* contemplates—that is, by an informed decision as to immunity, *not* by the chaotic device of having the district court give effect to the primary jurisdiction of the FPC and the requirements of the Federal Power Act only *after* judgment, in the enforcement of the decree.

As with the *California Motor Transport Co.* case,[4] the district court did not have the benefit of the *Ricci* decision when it entered its judgment. Therefore, as with the litigation aspect of the case, the wholesaling and wheeling issues should likewise be remanded to allow the court an opportunity to apply controlling legal principles subsequently articulated by this tribunal.

In any event, this Court should heed its own teachings in *Ricci* and itself take into account the informed judgment of the expert agency. If this is done, there can be no escape from the conclusion that there is a plain repugnancy between the two statutes. And under *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), this means that antitrust must yield to the regulatory scheme—not that the Court should sanction the makehift device of having the district court decree subject to vacation whenever the Commission finds that an interconnection would do violence to the requirements of the Federal Power Act.

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[4] *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

III. The Majority's *Per Se Condemnation* of Otter Tail's Contracts Is Manifestly Inconsistent With the Rule of Reason Approach Adopted in *Ricci* and in Other Portions of the *Otter Tail* Opinion Itself.

The *Ricci* opinion clearly recognized the necessity in any antitrust case involving a regulated industry of "arriving at the essential accommodation between the antitrust and the regulator regime." 41 U.S.L.W. at 4103. Thus the Court there properly applied the doctrine of *Silver v. New York Stock Exchange, supra,* which held the antitrust laws applicable to a stock exchange upon the understanding that *"under the aegis of the rule of reason,* traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act." 373 U.S. at 360 (emphasis added).

While this principle was applied by the majority in *Otter Tail* with respect to the wheeling and wholesaling issues,[5] when it came to Otter Tail's contracts with the Bureau of Reclamation and other suppliers, the majority apparently adopted the district court's view that the agreements are illegal *per se.* The Court thus disregards the fact that such voluntary interconnection agreements are specifically sanctioned and encouraged by Section 202(a) of the Federal Power Act and that any determination of their legality must also entail an accommodation of antitrust and Federal Power Act goals.

The necessity for such a "rule of reason" approach in precisely this context was explicitly acknowledged by no less an antitrust advocate than Professor Donald Turner, when, as

[5] As, for example, when the Court subjected the application of the decree to the condition that the policies of the Federal Power Act be given effect. Slip Opinion, p. 14.

head of the Antitrust Division, he testified before Congress as to the lack of any need for an express antitrust exemption covering voluntary coordination agreements:

> "Under the antitrust laws, pooling and other similar arrangements are tested by a 'rule of reason.' They are legal unless they unjustifiably restrain competition. Thus, pooling arrangements necessary to secure substantial economies of scale or similar substantial benefits would normally not violate the antitrust laws. Moreover, ancillary agreements are legal if they are necessary to carry out a legitimate primary agreement. Thus, while agreements to refuse to deal with competitors or to divide sales territories are normally illegal, if the parties can show that they are necessary to secure the benefits of a desirable pooling arrangement, their agreements will probably not be invalid under the antitrust laws." *Hearings on S. 3136 Before the Senate Comm. on Commerce.* 89th Cong., 2d Sess. 58 (1966) at 58.

It is plain that such interconnection agreements are crucial to the national welfare and that Congress was induced not to enact an express exemption by the Antitrust Department's explicit assurance that a "rule of reason" applied and would be utilized by it.[6] In such circumstances it is clearly improper for this Court now to introduce novel *per se* concepts in the very kind of regulated industry context that it had previously stated would be governed by the rule of reason. *Silver v. New York Stock Exchange, supra.* Under the Federal Power Act, Otter Tail's ability to enter into interconnection agreements

[6] This 1966 testimony by Prof. Turner came a scant three years before the government brought this suit in 1969, and at a time when many of the events covered by this case were taking place. As to the manifest unfairness of retroactive change of the law, see n. 2, p. 6, *supra.*

on commercially sound bases is an essential element of the public interest—an interest that can only be protected by a balanced "rule of reason" approach.[7]

IV. The Majority Opinion Is Predicated Upon Misapprehensions of Fact Which Are Specifically Negatived by the Record.

1. The majority apparently believed that Otter Tail had the only lines available for the transmission of power to municipalities in its area. Slip Opinion, p. 3. Indeed, it stated as fact that "in most instances" the low voltage distribution lines operated by rural coops "could not be used to supply power to proposed municipal utilities." Id., n. 3.[8] The record, how-

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[7] The application of a balanced rule of reason approach requires consideration of competitive business conditions. In following a *per se* approach, the district court dismissed out of hand Otter Tail's defense of business justification. Yet, even in non-regulated industries business justification has often been held to be a consideration, and in some instances determinative, in antitrust cases. Thus in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (cited at page 12 of the Slip Opinion), this Court stated with reference to the second method of handling the product, where the manufacturer retained title and dominion, 388 U.S. at pages 381-2:

> ". . . we cannot disagree . . that competition made necessary the challenged program; that it was justified by, and went no further than required by, competitive pressures; and that its net effect is to preserve and not to damage competition in the bicycle market."

See also, Union Leader Corporation v. Newspapers of New England, Inc., 284 F. 2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961); *United States v. Twentieth Century-Fox Film Corp.*, 137 F. Supp. 78 (Cal. D.C. 1955).

[8] The Court apparently made these factual assumptions on the basis of the trial court's findings, which in turn adopted the Government's Proposed Findings *in haec verba* in the prescise manner that this Court criticized in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-657 (1964). Indeed the Court's conclusions are even labeled "*Plaintiff's Proposed* Conclusions of Law." A. 129. The fact that the findings below were "not the product of the workings of the district judge's mind," (376 U.S. at 656) highlights the necessity for this Court to predicate its determination upon the evidence actually addressed to the record. See also *In re Colinas, Inc.*, 426 F. 2d 1005, 1008-1010 (1st Cir. 1970).

ever, lends no support to this supposition. The government's own witness, Trommershausen, testified as follows:

"Q. You were asked to trace the delivery of power to Hankinson and Elbow Lake on the existing facilities, which you did in your direct testimony, if the power was coming from the Bureau of Reclamation?

A. Yes, sir.

Q. Now, that is two out of quite a number of towns. Were you asked, also, to trace a similar path for other municipalities such as Aurora and Colman which are in the category of towns that have recently left Otter Tail?

A. No, I was not asked to do that.

Q. Can you do it?

A. No, because we don't have the details of the distribution system of the East River people that used to serve those. I do have knowledge from reading of the record in this case that both of those two systems are served from the distribution system of an East River cooperative member.

* * * * *

Q. So Colman had a source of power and a method of delivery of Bureau power to it without any reference to any Otter Tail lines?

A. That is correct. It was possible to get Bureau power without the use of any intervening subtransmission system of Otter Tail.

Q. And that is what is being done?

A. I understand that is true.

Q. The same thing is true as far as Aurora is concerned, is it?

A. Yes, sir.

Q. And I presume that situation in Colman and Aurora could be multiplied several times over by studying the locations, geographical and otherwise, of the towns on the Otter Tail system?

A. I presume a study could be made. I wasn't called upon to make such a study for this case.

Q. That illustrates, doesn't it, I think something you testified in your direct examination, that the Bureau of Reclamation has a transmission grid that does in some cases deliver directly to either G and T, as we call them, electric cooperatives, and in some cases distribution REA cooperatives without any intervening lines?

A. Yes, sir.

Q. It's illustrated by this Colman and Aurora situation by the connections of the Bureau of Reclamation with East River Electric Cooperative, for example?

A. Yes, sir.

Q. And that situation can be multiplied several times in this area by a study of the precise situation?

A. I think it could, yes.

Q. The same situation perhaps would be true for delivery from the Bureau's transmission grid directly to distribution cooperatives, there are several examples of that, are there not?

A. Yes, sir, both members and non-members of East River. Was your question directed to East River or the Bureau in general?

Q. Generally?

A. Yes.

Q. Distribution cooperatives, whether they are East River members or not?

A. Yes, sir.

Q. So there are many examples of sources of power to municipalities in the area serviced by the Otter Tail Power Company where the Bureau power can reach a potential municipality wishing to go into the municipal business without the use of Otter Tail's lines?

A. I would have a problem with your word 'many,' because I haven't made a study to determine which ones are interested and which should be considered.

Q. But you do recognize that that situation does exist?

A. Yes, sir. (A. 606-608.)

* * * * *

Q. Now, in your testimony, you were asked about the path of electricity from the Bureau over existing facilities, and there were two towns mentioned, Hankinson and Elbow Lake, and in connection with our discussion here on cross examination, I guess we are agreed that in both of those towns there were other sources of power and other methods of getting power to each of those towns besides the Otter Tail Power Company facilities?

A. Yes, sir.

Q. I mentioned in connection with your cross examination Colman and Aurora, and the same situation is true there, there were other sources of power and other means of getting electricity to the towns without the use of Otter Tail's lines?

A. Yes, sir.

Q. In fact, they are using other lines?

A. That is right, yes.

Q. Those are four towns out of a total of some 464 towns on the Otter Tail system receiving service at retail. Have you made a study of any of the others?

A. No, sir." (A. 614)

The plain fact is that the government failed to prove that Otter Tail has dominance of the electric lines available to transmit electric power to the municipalities in the market area. The facts shown by the Record are that Otter Tail owns only 8% of the electric lines in the market area.[9] The electric lines of cooperatives proliferate the area.[10] While many of the cooperatives' lines are 12.5 kv, such lines can and do transmit electric power to municipalities from the higher voltage grids of the Bureau and transmission cooperatives. Specifically, the Record shows this to be the actual situation for Colman, Aurora, Finley, Towner, and Velva.[11]

2. Running throughout the majority's opinion is the assumption that in the electric utility industry, as in other fields, monopoly breeds high rates, poor service and general inefficiency—all vices that may be cured by a competitive regime enforced by the antitrust laws. In fact, the municipal power disputes that constitute the subject matter of this case had nothing whatever to do with these considerations. Thus Martinson, another government witness, testified as follows:

"Q. Mr. Martinson, you have been a city official and have been personally interested in this municipal power project in Elbow Lake from its start?

---

[9] FPC Supply Area No. 26 which corresponds to the outer limits of Otter Tail's system. A. 1208; DX-94, A. 1201, 873; and See Finding 186, A. 87; DX-91, A. 1196-1198; A. 855-858, 877.

[10] A. 696, 697, 855-872, 905.

[11] *GX-84* Stips. 36, 38, 44, 52, 53, 59, 68; A. 1111, 1113, 1114, 1116, 1117.
Findings 137, 165, 170, 175; A. 77, 78, 83, 84.
Chart submitted by The United States, A. 1219, 670, 671, added to Record by Order dated July 5, 1972.
A. 865, 868, 869.
The Record further shows that these 12.5 kv cooperative lines could bring power to every municipality within the sample areas shown on the two maps, DX-92 and DX-93. (A. 862-872, 905). DX-92 is reproduced (on a reduced scale) in A. 1199. This sample area includes Colman and Aurora. DX-93 (which is not reproduced in the Appendix) is another sample area (which includes Velva). (A. 864-866).

A. That is correct.

Q. Perhaps it would be fair for me to state that you have been an enthusiastic supporter of the municipal power project?

A. That is correct.

Q. And would you agree with this statement, that the reasons for you or Elbow Lake being interested in a municipal power project did not include any dissatisfaction with the service of the Otter Tail Power Company at Elbow Lake?

A. No, I don't believe anybody has ever claimed that.

Q. The service of Otter Tail was adequate and sufficient?

A. Correct.

Q. And would you also agree that the level of rates which Otter Tail was charging the Village of Elbow Lake was not the motivating reason for you supporting or other supporters in Elbow Lake proposing a municipal plant?

A. No, it was not.

Q. In fact, one of the minutes that you have identified here as an exhibit provides for putting into effect precisely the same rates for the municipal plant that Otter Tail was charging?

A. That is correct.

Q. And that was done, wasn't it?

A. That is right." (A. 299-300).

3. In adopting the Government's proposed findings verbatim, the district court was led into numerous other factual errors.[12] One of them involves the relevant market in the sale

[12] See n. 8, p. 14, *supra*.

of electric power at retail.[13] Otter Tail's share of this market within the geographic market area can properly be determined only by the killowatt hours consumed in retail sales. The uncontroverted evidence shows its share is 28.9%.[14]

Another factual error involves Otter Tail's intent. A reading of the record clearly shows that Otter Tail's intent is "competitively motivated" rather than "monopoly motivated." It is far too easy to label a true competitor in a monopoly industry as a monopolist. Otter Tail's conduct shows it wants to remain viable in order to compete. Otter Tail should be commended rather than condemned for having put together a system capable of bringing reliable electric service to these small towns in the rural midwest. Its customers needed those capital facilities to provide them with adequate and reliable electric service at reasonable rates, and to meet and compete with the tremendous forces of government power which seek to displace it in the market. The real facts as to the true competitive situation can be seen and appreciated by an examination of the whole Record.

It will show that there is no real economic competition between government under-priced power and Otter Tail's investor-owned power supply. Government power (from the Bureau or the Cooperatives) is marketed at a lower price level (due to their tax and financing advantages), which makes it impossible for an investor-owned generated supply to compete on a price basis.[15] The real competition is political rather than economic. This competition is continuous. It does not end with one election. The Government urged that when a municipal

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[13] Finding 183, A. 86. See also Conclusion of Law II, A. 129 and Government Brief, p. 9.

[14] DX-94, A. 1201-1208, A-872-876. As the dissent notes, Slip Opinion, p. 2, n. 1, use of the number of towns is inappropriate where they vary in population from 20 inhabitants to 29,000.

[15] A. 667, 737, 738, 911, 946, 962, 963.

election results in a vote in favor of a proposed municipal plant, Otter Tail should at that point quit competing for business in the municipality and do nothing further. We submit that is an unreasonable limitation on one of the competitors.

Otter Tail's real intent is motivated by a desire to survive and maintain its economies and benefit its ratepayers by avoiding the loss of customers to ill-advised excursions into the electric power business by the towns it serves.

A look at the whole Record should include the sworn testimony of the President of Otter Tail, specifically addressed to this point:

"Q. Now, what are the facts with reference to whether Otter Tail either expects to or has the power to or is meeting these various types of competition or whether it has made any attempt to eliminate it?

A. . . . Otter Tail Power Company expects and, in fact, welcomes competition at all levels and does not have the slightest desire or intention or plan to eliminate competition at any point.

The only thing related to that is that Otter Tail Power Company does not feel that it must lend the use of its own facilities to a competitor to help destroy the business of Otter Tail Power Company.

Q. In that regard, what, from the standpoint of management, and you as head executive of Otter Tail Power Company, does this desire of not furnishing your own facilities to help the other systems, what potential effect does that have in the operation or future of Otter Tail Power Company?

A. In my opinion, the preservation of that policy and that concept is vital to the future of Otter Tail Power Company. We will meet all legitimate competition, but

if we would be forced to lend the use of our own facilities to a competitor to help him drive us out of business, then it is my opinion that I would be making an imprudent, improper business judgment that would not be to the benefit of our own 100,000 present retail customers, our 10,000 or more security holders or the thousand employees that are associated with me in managing and operating the company; that we simply would be tending to drive Otter Tail out of existence if we did not maintain that policy; and in that way, we would destroy the competition that is now brought about by Otter Tail being an electric supplier in our community, that competition would be diminished."

The majority's position is thus predicated upon factual assumptions that are totally divorced from the true facts of record. In view of the immediate impact that the decision will have upon Otter Tail's 100,000 ratepayers, rehearing should be granted to permit reconsideration based upon the real circumstances at bar as established by the evidence.[16]

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[16] In addition to the foregoing points, rehearing would allow the Court an opportunity to clarify obscurities in its present directive to the district court to reconsider the litigation aspect of the case in light of *California Motor Transport Co. v. Trucking Unlimited, supra.*

CONCLUSION

For the reasons stated above, rehearing should be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

DAVID F. LUNDEEN, a member of the Bar of the Supreme Court and one of the Counsel appearing in this case on behalf of the Appellant, does hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

Respectfully,

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